

COMMONWEALTH OF KENTUCKY
BEFORE THE PUBLIC SERVICE COMMISSION

In the matter of:

ASTOR CLAY COLLINS
d/b/a MR. T'S CARWASH

COMPLAINANT

vs.

TOM THIENEMAN
BARBARA R. THIENEMAN
TOM THIENEMAN CO.
EDEN APARTMENTS SEWAGE
TREATMENT PLANT

DEFENDANTS

CASE NO.
90-279

O R D E R

On September 12, 1990, a complaint was filed by Astor Clay Collins, d/b/a Mr. T's Carwash ("Collins") against Tom Thieneman, Barbara R. Thieneman, Tom Thieneman Co., and Eden Apartments Sewage Treatment Plant (collectively "Thieneman") charging Thieneman with the unauthorized operation of a sewer utility under the jurisdiction of this Commission. On October 8, 1990, Thieneman filed its answer to the complaint in which it admitted operation of a sewer utility, but denied that the utility was under the jurisdiction of the Commission. A public hearing was held before the Commission on June 21, 1991 pursuant to notice served upon both parties. Thieneman appeared and was represented by counsel, but Collins did not appear and was not represented by counsel.

STATEMENT OF FACTS

On May 15, 1967, Thieneman obtained a building permit to construct a 3,000-gallon wastewater treatment plant on Ninette Court near Dixie Highway in southwest Jefferson County. A second permit was later issued to Thieneman on May 20, 1971 to expand the plant to 39,500 gallons per day. The plant was constructed by Tom Thieneman and Barbara Thieneman to serve a 124-unit apartment complex owned by them known as the Eden Apartments. The property upon which the apartments are located is part of a larger tract that adjoins Dixie Highway, and Thieneman later sold three lots along Dixie Highway from the tract. A Taco Tico, a McDonald's and a Pizza Hut were constructed on the lots and they are served by the Thieneman sewer treatment plant.

Thieneman also purchased a tract of land from National Garage Builders that also adjoins Dixie Highway and divided it into three lots. Two of those lots were sold and used for the construction of a Wendy's restaurant and a Mr. Gatti's restaurant. Mr. T's Carwash was constructed on the third lot and Thieneman operated the car wash until it was sold to Collins. Wendy's, Mr. Gatti's, and Mr. T's Carwash are also served by the sewer treatment plant along with ProBowl, Inc., a bowling alley owned by Thieneman.

Except for Eden Apartments, each business connected to the sewage treatment plant pays a flat rate each month for sewer service. The rates range from \$70 to \$150 depending upon each business's projected use of the system. Any expenses not covered by the monthly rates are paid by Eden Apartments. Thieneman has

never filed its rates or conditions of service with the Commission.

The complaint from which this action originates was filed by Collins when Thieneman attempted to collect \$100 per month from Mr. T's Carwash. Collins contends that the fee is invalid because the sewer plant is a utility and cannot charge rates for service unless they are on file with this Commission. Thieneman argues in defense that the sewer plant is not a utility as defined by KRS 278.010(3)(f) and, therefore, it is not subject to Commission jurisdiction. No issue has been raised as to the operation of the sewer plant, which is generally consistent with Commission regulations, nor as to the reasonableness of the rates being charged.

CONCLUSIONS OF LAW

KRS 278.040(1) provides, in part, that the Commission "shall regulate utilities." The issue presented here is whether Thieneman is a "utility" within the meaning of that section and thereby subject to Commission regulations. KRS 278.010(3)(f) defines a sewage treatment facility, in part, as a "utility" if it is used for "the treatment of sewage for the public, for compensation, if the facility is a subdivision treatment facility plant located in a county containing a city of the first class. . . ." The statute does not define what is meant by a subdivision and Thieneman maintains that the term subdivision refers only to a residential development. Because the Thieneman sewage treatment plant serves only commercial and rental properties, Thieneman argues it is not a "utility" within the

meaning of KRS 278.040 and is not subject to the Commission's jurisdiction.

Neither KRS 278.010, the definition section pertaining to the statute relating to the Commission and its authority, nor KRS 446.010, the definition section applicable to all statutes, define what is meant by a subdivision. The only statutory definition of the term appears to be in KRS 100.111(22). That definition, however, refers specifically to planning and zoning regulations and is not applicable here. Therefore, the term, as it applies to a sewer utility, must be interpreted in accordance with accepted rules of statutory construction.

Kentucky, by statute, has adopted the "plain meaning" rule of construction whereby words of a statute are construed according to their commonly understood meaning. KRS 446.080(1) requires all statutes to be construed "with a view to promote their objects and carry out the intent of the legislature," and KRS 446.080(4) requires that words and phrases of a statute be construed according to "the common and approved usage of language." Thus, in United Services Automobile Association v. State Farm Mutual Automobile Insurance Co., Ky.App., 784 S.W.2d 786, 787-788 (1990), the court held:

The cardinal rule of statutory construction is that the intention of the legislature should be ascertained and given effect. . . . It is axiomatic that the words of a statute are to be given their plain meaning unless to do so would constitute an absurd result.

Therefore, in any case requiring the construction of a statute, the central question to be resolved is what did the legislature intend to accomplish by enacting the statute.

Although this state has long regulated public utilities, the definition of a utility did not always include sewage treatment facilities. It was not until 1974, when KRS 278.010 was amended, that owners of sewage treatment plants became regulated utilities. 1974 Kentucky Acts, ch. 118 §1. Moreover, unlike electric, telephone, water, and natural gas utilities, the 1974 amendment did not make all sewage utilities subject to regulations, but, instead, the amendment limited the Commission's authority in counties containing a city of the first class to sewer utilities that serve subdivisions. The difficulty here is no reason is given in the statute for the restriction. Therefore, because the legislature did not define what it meant by a subdivision, it is necessary to look outside the statute to accepted definitions of the term to determine the legislative intent.

There do not appear to be any court decisions in Kentucky defining a subdivision. For a general definition, Black's Law Dictionary defines a subdivision as "a division into smaller parts of the same thing or subject matter." Black's Law Dictionary 1277 (5th ed. 1979). Adopting a similar definition, the Ohio court in McKain v. Toledo City Plan Commission, 26 Ohio App.2d 171, 270 N.E.2d 370, 373 (1971), stated:

Subdividing is the taking of an entire tract of land, and dividing it into smaller units designated as lots, sites or parcels--the area or tract so divided into smaller units being known as a subdivision and evidenced by a drawing known as a plat.

Thus, it would appear that the division of property into smaller parcels creates a subdivision within the ordinarily accepted meaning of that term. By dividing the property acquired from

National Garage Builders into three lots and by carving three more lots out of the tract upon which the apartments are located, Thieneman created a subdivision that is served by its sewage treatment plant. Thieneman thereby became a utility subject to the jurisdiction of the Commission. As a utility, Thieneman is permitted by KRS 278.030 to charge fair, just, and reasonable rates for the services it renders, establish reasonable rules for the conduct of its business and the conditions upon which it will provide service, and employ reasonable classifications of its customers for rate purposes. KRS 278.160 requires utilities to file with the Commission their rate schedules and regulations and to maintain for public inspection copies of their rate schedules and regulations. Thieneman should comply with these requirements within 15 days from the date of this Order.

This Commission being otherwise sufficiently advised,

IT IS ORDERED that:

1. Thieneman shall, within 15 days from the date of this Order, file with the Commission schedules showing all rates and conditions for service established by it and shall maintain for public inspection copies of this same information.
2. The schedules shall be in the form prescribed by Commission Regulation 807 KAR 5:011 and shall be maintained for public inspection in the manner prescribed by the regulation.
3. The rates and conditions for service shall become effective immediately upon their submission.

Done at Frankfort, Kentucky, this 18th day of September, 1991.

PUBLIC SERVICE COMMISSION


Chairman


Vice Chairman

Commissioner

ATTEST:


Executive Director